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KEEPING REGIONALISM UNDER 'CONTROL' OF THE MULTILATERAL TRADING SYSTEM: STATE OF PLAY AND PROSPECTS

*Sherzod Shadikhodjaev**

ABSTRACT

The rapid increase in regional trade agreements (RTAs) is a noticeable trend in international trade today. There have been more than 350 RTAs in force notified to the World Trade Organization (WTO), and this number will grow over time. The worldwide proliferation of regional arrangements has provoked a lot of discussions about its implications for the multilateral trading system. Some would underscore the complimentary nature of RTAs, others would indicate negative effects on the multilateral trade regime, with none of these views being able to uniformly reflect the complexity of the current picture of world trade. The purpose of this article is to revisit the WTO tools designed to keep regionalism within its reach. We will evaluate the state of play in three areas of the WTO domain—rule-making, multilateral review and dispute settlement—and see if there is any room for improvement of WTO's "control" functions in each of these fields.

I. INTRODUCTION

REGIONAL trade agreements (RTAs) have become an important component of the international trade order. They typically take the form of free trade agreements (FTAs) or customs unions (CUs). FTAs eliminate duties and regulatory trade restrictions between contracting parties, while CUs additionally harmonize commercial policies of their members vis-à-vis third countries.¹

With preferential treatment for designated countries, RTAs constitute an exception to the most-favored-nation (MFN) principle of the World Trade Organization (WTO), which is introduced to preserve non-discrim-

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1. For details, see *infra*, section III.A.

ination among all its members.² A legal framework for RTAs within the WTO system is provided by Article XXIV of the General Agreement on Tariffs and Trade (GATT), Article V of the General Agreement on Trade in Services (GATS), and the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause).³

The rapid increase in RTAs has been a prominent feature of international trade relations in recent times. As of March 1, 2013, there are 363 RTAs in force, with 200 FTAs and sixteen CUs notified under GATT Article XXIV, thirty-six agreements notified under the Enabling Clause and 111 agreements notified under GATS Article V.⁴ These figures are based on the number of notifications, whereby the same agreement notified for goods and services separately is counted twice. But, the physical number of RTAs—counting goods and services together—amounts to 241, which can be further broken down as 133 (goods), one (service) and 107 (goods and services).⁵ As seen from Figure 1, regional trade activities have significantly intensified from the mid-1990s onwards.⁶ With a persistent impasse in the current Doha Round of multilateral trade negotiations, regionalism will likely continue to grow.⁷

2. PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 650 (2005).

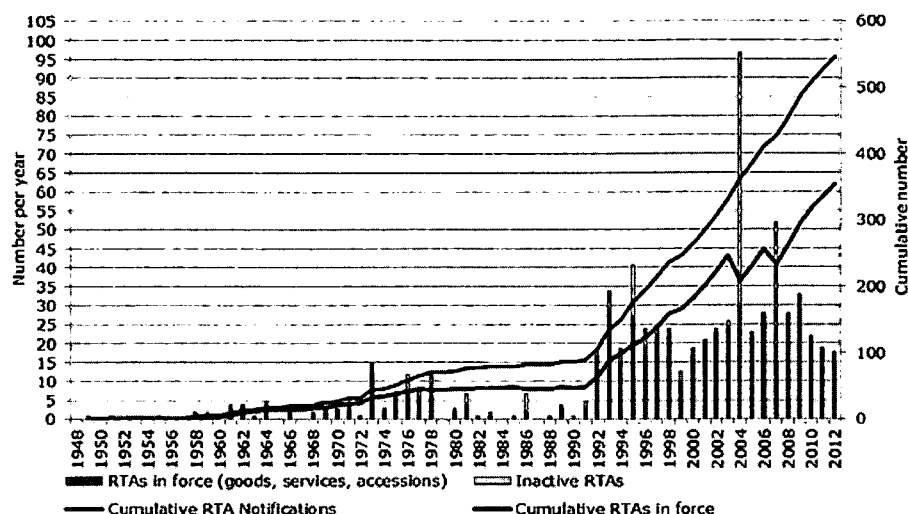
3. Committee on Regional Trade Agreements, *Synopsis of "Systemic" Issues Related to Regional Trade Agreements—Note by the Secretariat*, ¶ 10, WT/REG/W/37 (Mar. 2, 2000).

4. *Summary Tables Containing WTO Figures on RTAs*, WTO, <http://rtais.wto.org/UI/publicsummarytable.aspx> (last updated Mar. 1, 2013).

5. *Id.*

6. *Regional Trade Agreements: Facts and Figures*, WTO, http://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited Sept. 18, 2013).

7. For an in-depth explanation of the evolution of RTAs, see WTO Secretariat, *World Trade Report 2011, The WTO and Preferential Trade Agreements: From Co-Existence to Coherence*, 48–91 (2011), available at http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf.

Figure 1. RTA Trends (1948-2012)⁸

Apart from their increasing numbers, RTAs have produced a multitude of rules and regulations that apply across countries in parallel with WTO disciplines. Regional arrangements and the WTO share the same goal of trade liberalization, albeit with different depth and scope. The relationship between the multilateral trading system and RTAs has proved to be a very complex issue provoking different reactions among commentators and policy makers. As noted by WTO Director-General Pascal Lamy:

Some would emphasize a clash of systems and inherent inconsistencies between discriminatory and non-discriminatory approaches to trade relations. Others would point to the growing prominence of [RTAs] as a reflection of the demise of multilateralism. Others still would assert that regional and multilateral arrangements are in essence complementary and need to be fashioned accordingly. None of these perspectives can singly capture the complexity of international trade relations in a globalizing world.⁹

This controversy surrounding the WTO-RTA relationship naturally raises the question as to how far the WTO's "controlling" mechanisms can reach. The WTO treats RTAs in three basic ways: rule-making, multilateral surveillance, and dispute settlement procedures. The principal bodies in charge are, respectively, (1) the Ministerial Conference and the General Council, (2) the Committee on Regional Trade Agreements (CRTA) and the Committee on Trade and Development (CTD), and (3) panels and the Appellate Body.¹⁰ This article aims to take stock of the WTO work in these three directions and consider issues for its future

8. See *Regional Trade Agreements: Facts and Figures*, *supra* note 6.

9. *Id.* at 3.

10. *Regional Trade Agreements: Committee*, WTO, http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Sept. 18, 2013).

agenda. For this purpose, we will first discuss the hierarchical structure of the WTO-RTA legal order, and then examine each of the areas of WTO's control.

II. WTO AGREEMENT AS SUPERIOR TO RTAS

As both the WTO Agreement¹¹ and RTAs are treaties—legally binding inter-governmental agreements,¹²—the nature of the relationship between the WTO and RTAs can be established on the basis of the Vienna Convention on the Law of Treaties (VCLT).¹³ According to previous studies,¹⁴ it is Article 41 of the VCLT which characterizes their relationship in a most appropriate way.¹⁵ Namely, paragraph 1 of Article 41 allows a subset of the parties to a multilateral treaty (e.g., the WTO Agreement) to conclude an agreement (e.g., RTA) to modify the former with the legal effect arising to these parties only:

Article 41

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
 - (a) the possibility of such a modification is provided for by the treaty; or
 - (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.¹⁶

11. This article refers to the "WTO Agreement" as a collective term for all WTO legal instruments agreed to by members as a "single undertaking." The title "Marrakesh Agreement Establishing the World Trade Organization" (or the "Marrakesh Agreement") is used in this article in a narrower sense for the agreement (the WTO "Charter") consisting of sixteen articles that define the legal status of the WTO as an international organization. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

12. In particular, the Appellate Body explicitly referred to the WTO Agreement as a "treaty." Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 15, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

13. See Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 43, 53–58 (Lorand Bartles & Federico Ortino eds., 2006).

14. *Id.* at 54–55; JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/ WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 274–83 (2002).

15. Article 30 of the VCLT, *infra* note 16, is also relevant, but of less practical importance. See MATHIS, *supra* note 14, at 273–74; see also Cottier & Foltea, *supra* note 13, at 53–55.

16. Vienna Convention on the Law of Treaties art. 41.1, May 23, 1969, 1155 U.N.T.S. 331.

Subparagraph (b) of VCLT Article 41.1 applies where the text of the treaty is silent on the modification issue.¹⁷ Since the WTO Agreement explicitly acknowledges the possibility for an RTA conclusion,¹⁸ it is subparagraph (a) which is more pertinent to the WTO-RTA relationship.¹⁹ This provision implicitly establishes the superiority of the WTO Agreement.²⁰ Accordingly, RTAs entered into by WTO members must comply with relevant substantive and procedural requirements of GATT Article XXIV, GATS Article V and the Enabling Clause, as elaborated in subsequent WTO instruments.²¹

Besides this conventional "treaty vs. treaty" approach to the WTO-RTA relationship, another interesting approach can be explored from the *Mexico—Taxes on Soft Drinks* case. There, Mexico's tax on certain beverages, which negatively affected imports from the United States, was found to be a discriminatory measure in breach of the GATT principle of national treatment.²² In response, Mexico invoked Article XX(d) of the GATT that provides justification for illegal measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT]."²³ Mexico asserted that the tax was introduced as a countermeasure to induce the United States to comply with the latter's obligations under the North American Free Trade Agreement (NAFTA) regarding market access conditions for Mexican sugar.²⁴ But,

17. MATHIS, *supra* note 14, at 276.

18. Article XXIV:5 of the GATT states "the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area." General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1154 (1994), art. XXIV:5, available at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt_1994_09_e.htm (last visited Sept. 18, 2013) [hereinafter GATT]. Article V:1 of the GATS states "[t]his Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement." General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125 (1994), art. V:1, available at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (last visited Sept. 18, 2013) [hereinafter GATS]. Paragraph 1 of the Enabling Clause, read together with paragraph 2(c), permits RTAs between developing country members "[n]otwithstanding the provisions of Article I of the General Agreement." *Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶ 1, (L/4903) (Dec. 4, 1979) [hereinafter Enabling Clause].

19. Cottier & Foltea, *supra* note 13, at 55–56.

20. *Id.* at 56.

21. See *infra*, sections III.A, IV.A.

22. Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶¶ 8.59, 8.96, 8.123, 8.155–57, WT/DS308/R (Oct. 7, 2005) (adopted Mar. 24, 2006) [hereinafter Mexico Panel Report].

23. GATT, *supra* note 18, art. XX(d); Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, n.106, WT/DS308/AB/R (Mar. 6, 2006) (adopted Mar. 24, 2006) [hereinafter Mexico Appellate Body Report].

24. According to Mexico, prior to this case, it initiated "NAFTA dispute settlement proceedings" to challenge U.S. non-compliance "with its obligation under the NAFTA relating to market access for Mexican sugar to the [U.S.] market." Be-

the panel and the Appellate Body dismissed Mexico's defense on the grounds that, *inter alia*, the NAFTA was not covered by the Article XX(d) exception.²⁵ Notwithstanding this negative finding, the legal interpretation provided by the Appellate Body left some room for RTAs to fall under Article XX(d). More specifically, the Appellate Body made it clear that the term "laws or regulations" in this provision comprises "*rules that form part of the domestic legal system*"²⁶ and cited the EC's statement below as a supplementary explanation:

It is entirely possible that international agreements may be incorporated into the domestic legal order in such a way that they can be invoked as against individuals, and enforce[d] against them. If this is the case, the international agreement, albeit international in origin, may be regarded as having become an integral part of the domestic legal order of such Member, and thus a law or regulation within the meaning of Article XX (d) [of the] GATT [1994].²⁷

In other words, although "laws or regulations" generally refer to domestic rules, RTAs may still fall under this concept if they have direct effect within the member's legal order without requiring implementing legislation. For the purpose of the Article XX(d) defense, such RTAs must be "not inconsistent with the provisions of [the GATT]."²⁸ Thus, the WTO-RTA relationship in the context of Article XX(d) can be considered from the "treaty vs. domestic law" perspective under which the GATT as part of the WTO Agreement takes precedence over the RTA as part of domestic law.²⁹ It is true that the possibility for RTAs to fall within the ambit of Article XX(d) will hardly materialize, but the *Mexico—Taxes on Soft Drinks* case shows that it is not completely ruled out.

Having established the superiority of WTO law over RTAs concluded by WTO members, we will proceed now to examine, in the following parts, how this supremacy is secured and enforced in practice.

III. RTAs AND WTO RULE-MAKING

Rule-making is a significant part of WTO activities. Main stakeholders here are members of the organization which are represented, for the purposes of rule-making, at the level of the Ministerial Conference or the General Council. They decide which rule to adopt, modify or annul. This

cause of the persistent opposition of the United States to the panel establishment, Mexico had no choice but to adopt the retaliatory tax "to compel the United States to comply with its obligations and [to] protect [Mexico's] own legal and commercial interests." Mexico Appellate Body Report, *supra* note 23, at n. 106.

25. Mexico Panel Report, *supra* note 22, ¶¶ 8.191–197; Mexico Appellate Body Report, *supra* note 23, ¶¶ 69–71.

26. Mexico Appellate Body Report, *supra* note 23, ¶¶ 69–70 (emphasis added).

27. *Id.* n. 149.

28. *Id.* ¶ 70.

29. Article XVI:4 of the Marrakesh Agreement, *supra* note 11, states "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." The "annexed Agreements" here include, *inter alia*, the GATT.

section starts with an overview of the existing WTO disciplines designed to ensure that regional arrangements facilitate trade within a preferential area and do not raise barriers to trade of outside countries.³⁰ The second part of this section will discuss the state of new rule-making initiatives in the Doha negotiations and possible alternatives.

A. OVERVIEW OF EXISTING DISCIPLINES

Some of the GATT, GATS and Enabling Clause provisions on regional trade specify procedural issues, such as notification and multilateral review of RTAs. As observed below, most of these procedures have, as a matter of fact, been superseded by a new transparency process. Since the transparency process will be discussed in section IV on the multilateral surveillance, this part will mainly focus on substantive aspects of RTAs.

1. GATT Article XXIV

Article XXIV of the GATT imposes a number of internal and external requirements for RTAs. The internal requirement specifies certain standards for the liberalization of trade between RTA countries. In particular, both an FTA and a CU must remove the "duties and other restrictive regulations of commerce" (except for certain restrictive measures) on "substantially all the trade" (SAT).³¹ The coverage of SAT may vary depending on the type of RTA. For CUs, it applies either to the entire intra-regional trade or only trade in products originating in members' territories.³² As for FTAs, it is only "trade in products originating in [those] territories" that are covered by the SAT concept.³³

The external requirement essentially aims to prevent negative effects vis-à-vis non-parties. As far as FTAs are concerned, the "duties and other regulations of commerce" towards third countries at a post-FTA stage must "not be higher or more restrictive" than those maintained at a pre-FTA stage.³⁴ In the case of CUs, the requirement not to raise trade barriers "on the whole" applies to "the general incidence of the duties and regulations of commerce,"³⁵ implying that the "pre-and-post" comparison for CUs, unlike FTAs, should be carried out not on an item-by-item basis but with respect to the whole range of subject products.³⁶ An additional external requirement for CU members is to apply "substan-

30. See GATT, *supra* note 18, art. XXIV:4; see also GATS, *supra* note 18, art. V:4; see also Enabling Clause, *supra* note 18, ¶ 3(a).

31. GATT, *supra* note 18, art. XXIV:8. The external and internal requirements of Article XXIV may be invoked in relation to concrete RTA-related measures, such as e.g., a ban on the use of duty drawback schemes within a preferential trade regime. See Sherzod Shadikhodjaev, *Duty Drawback and Regional Trade Agreements: Foes or Friends?*, 16 J. INT'L ECON. L. 587, 600–607 (2013).

32. GATT, *supra* note 18, art. XXIV:8(a)(i).

33. *Id.* art. XXIV:8(b).

34. *Id.* art. XXIV:5(b).

35. *Id.* art. XXIV:5(a).

36. MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 564 (2d ed. 2006).

tially the same duties and other regulations of commerce” vis-à-vis third countries.³⁷ Should a CU member raise its MFN tariff to satisfy this requirement, it must generally provide “compensatory adjustment” for non-CU members pursuant to GATT Article XXVIII.³⁸

Some elements of Article XXIV (mostly procedural issues)—e.g., the evaluation of the “general incidence” of trade instruments in CUs, the “reasonable length of time” for the formation of RTAs, review of RTAs, dispute settlement and etc.—are further elaborated in the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (Understanding on Article XXIV).³⁹ In particular, the Understanding stipulates that the general incidence of duties must be evaluated on the basis of “an overall assessment of weighted average tariff rates and of customs duties collected,” whereas the assessment of the general incidence of regulations of commerce may include “individual measures, regulations, products covered and trade flows affected.”⁴⁰ It also makes it clear that free-trade areas or CUs are to be completed, as a principle, within a “reasonable length of time” of “10 years,” or more for “the exceptional cases.”⁴¹

2. *GATS Article V*

Article V of the GATS uses a broader concept of “economic integration” agreements that are required to have “substantial sectoral coverage” in terms of number of sectors, trade volume and modes of supply, with no *a priori* exclusion of any mode of supply allowed.⁴² In addition, RTAs within the meaning of the GATS must eliminate existing measures or prohibit new ones that are discriminatory in the sense of the national treatment clause.⁴³ Article V also introduces special and differential treatment for developing countries, such as flexible definitional requirements for services agreements and more favorable conditions for juridical persons owned or controlled by developing country’s natural persons.⁴⁴ As with the counterpart provisions for the goods sector, the GATS requires that agreements do not raise pre-RTA barriers towards third countries.⁴⁵ Procedures of Article XXI of the GATS will apply if services RTAs entail modification of WTO commitment schedules of parties.⁴⁶

37. GATT, *supra* note 18, art. XXIV:8(a)(ii).

38. *Id.* art. XXIV:6.

39. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, *available at* http://www.wto.org/english/docs_e/legal_e/10-24_e.htm [hereinafter Understanding on Article XXIV].

40. *Id.* ¶ 2.

41. *Id.* ¶ 3.

42. GATS, *supra* note 18, art. V:1.

43. *Id.* art. V:1(b).

44. *Id.* art. V:3.

45. *Id.* art. V:4.

46. *Id.* art. V:5.

3. *Enabling Clause*

The Enabling Clause is applicable to RTAs—regional or global arrangements—between or among developing country members. Such RTAs provide for “the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another.”⁴⁷ Obviously, this definition loosens the internal requirement for South-South RTAs by allowing tariff *reduction* and omitting the SAT standard. The external requirement is worded in less detail. Notably, RTAs must be designed “not to raise barriers to or create undue difficulties for the trade of any other contracting parties,” and must “not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favored-nation basis.”⁴⁸

B. THE WORK ON IMPROVEMENT OF RULES

In the Ministerial Conference in Doha in 2001, WTO members launched a new round of multilateral trade negotiations which is currently still ongoing. As many parts of the WTO provisions on RTAs are ambiguously worded, the members agreed to “negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements.”⁴⁹ In order for the WTO rules to better accommodate the special needs of developing countries, the members also agreed that the negotiations must “take into account the developmental aspects of regional trade agreements.”⁵⁰

The Doha negotiations on RTAs have so far succeeded in reforming multilateral procedures,⁵¹ but have not yet produced any tangible result on substantive provisions (basically “systemic issues”). In this regard, a most recent report by the Chairman of the Negotiating Group on Rules indicates persistent gaps in members’ positions, and appeals for a “pragmatic, flexible and less doctrinaire approach.”⁵² As is evident from Table 1, members have so far made twenty-one submissions on systemic issues. Most of the proposals have concerned SAT, as well as special and differential treatment for developing countries. With respect to SAT, a number of proposals suggested the setting of a minimum benchmark for SAT to be measured pursuant to quantitative and/or qualitative assessments of trade flows and tariff lines.⁵³ As for developmental aspects of RTAs, sev-

47. Enabling Clause, *supra* note 18, ¶ 2(c).

48. *Id.* ¶ 3(a)–(b).

49. World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 28, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

50. *Id.*

51. *See infra*, section IV.

52. Report by Ambassador Dennis Francis, Chairman, Negotiating Group on Rules, *Negotiations on Regional Trade Agreements: Systemic Issues*, ¶¶ 7–9, TN/RL/W/253 (Apr. 21, 2011).

53. *Id.* ¶ 4.

eral proposals suggested incorporation of additional flexibilities for developing countries in the existing WTO rules on RTAs.⁵⁴ In the light of minor progress, the negotiators have recently considered a new proposal for a forward-looking, post-Doha work program on all systemic issues, but have been unable to bridge the gap in their views.⁵⁵

Table 1. WTO Member Submissions on Systemic Issues

Document Symbol	Document Date	Submitted by	Key Points
TN/RL/W/250	Jan. 26, 2011	Bolivia	Developmental aspects of RTAs ⁵⁶
TN/RL/W/190	Oct. 28, 2005	Japan	Quantitative and qualitative benchmarks for SAT ⁵⁷
TN/RL/W/187	Sept. 12, 2005	Chile, Korea	Best Practice for RTAs/FTAs in Asia-Pacific Economic Cooperation ⁵⁸
TN/RL/W/186	Aug. 3, 2005	Chinese Taipei	Open regionalism via accession clause for non-parties ⁵⁹
TN/RL/W/185	July 22, 2005	China	Developmental aspects of RTAs, SAT, transitional period, retroactivity ⁶⁰
TN/RL/W/182	June 9, 2005	Chinese Taipei	Open regionalism via accession clause for non-parties ⁶¹
TN/RL/W/180	May 13, 2005	Australia	SAT, implementation period, special and differential treatment ⁶²
TN/RL/W/179	May 12, 2005	European Communities (EC)	SAT, transition periods, "other regulations of commerce," developmental aspects ⁶³
TN/RL/W/173/Rev.1	Mar. 3, 2005	Australia	SAT ⁶⁴

54. *Id.* ¶ 5.

55. *Id.* ¶ 6.

56. Submission by Plurinational State of Bolivia, *Negotiations Aimed at Clarifying and Improving Disciplines and Procedures Under the Existing WTO Provisions Applying to Regional Trade Agreements—A Proposal to Clarify Developmental Aspects of Regional Trade Agreements*, TN/RL/W/250 (Jan. 26, 2011).

57. Submission on Regional Trade Agreements, *Paper by Japan*, TN/RL/W/190 (Oct. 28, 2005).

58. Best Practice for RTAs/FTAs in APEC, *Communication from Chile and the Republic of Korea*, TN/RL/W/187 (Sept. 12, 2005).

59. Submission on Regional Trade Agreements by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Paper by the Separate Custom Territory of Taiwan, Penghu, Kinmen, and Matsu*, TN/RL/W/186 (Aug. 3, 2005).

60. Submission on Regional Trade Agreements by China, *Paper by China*, TN/RL/W/185 (July 22, 2005).

61. Submission on Regional Trade Agreements by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Paper by the Separate Custom Territory of Taiwan, Penghu, Kinmen and Matsu*, TN/RL/W/182 (June 9, 2005).

62. Submission on Regional Trade Agreements by Australia, *Paper by Australia*, TN/RL/W/180 (May 13, 2005).

63. Submission on Regional Trade Agreements by the European Communities, *Paper by the European Communities*, TN/RL/W/179 (May 12, 2005).

64. Submission on Regional Trade Agreements by Australia, *Paper by Australia*, TN/RL/W/173/Rev.1 (Mar. 3, 2005).

TN/RL/W/173	Mar. 1, 2005	Australia	SAT ⁶⁵
TN/RL/W/165	Oct. 8, 2004	Japan	Developmental aspects of RTAs as to SAT, transition period, and parameters for tariff preferences under Enabling Clause RTAs ⁶⁶
TN/RL/W/163	Sept. 13, 2004	Chile	Coverage of services RTAs ⁶⁷
TN/RL/W/155	Apr. 28, 2004	African, Caribbean and Pacific (ACP) States	Developmental aspects of RTAs as to SAT, transition period, and parameters for Enabling Clause RTAs ⁶⁸
TN/RL/W/152	Apr. 26, 2004	Chile	Clarification issues under GATS Article V ⁶⁹
TN/RL/W/151	Apr. 23, 2004	Chile	Preliminary ideas for substantive discussions ⁷⁰
TN/RL/W/116	June 11, 2003	Korea	"Other regulations of commerce," "other restrictive regulations of commerce" ⁷¹
TN/RL/W/114	June 6, 2003	India	SAT, rules of origin, sanitary/technical requirements, trade remedies, grandfathering ⁷²
TN/RL/W/32	Nov. 25, 2002	Turkey	SAT, rules of origin, regulatory harmonization, developmental aspects ⁷³
TN/RL/W/14	July 9, 2002	EC and member countries	Scope of systemic issues for clarification ⁷⁴
TN/RL/W/15	July 9, 2002	Australia	SAT ⁷⁵
TN/RL/W/2	Apr. 24, 2002	Australia	Scope of systemic issues for clarification ⁷⁶

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65. Submission on Regional Trade Agreements by Australia, *Paper by Australia*, TN/RL/W/173 (Mar. 1, 2005).
 66. Submission on Regional Trade Agreements, *Paper by Japan*, TN/RL/W/165 (Oct. 8, 2004).
 67. Submission on Regional Trade Agreements, *Paper by Chile*, TN/RL/W/163 (Sept. 13, 2004).
 68. Submission on Regional Trade Agreements, *Paper by the ACP Group of States*, TN/RL/W/155 (Apr. 28, 2004).
 69. Submission on Regional Trade Agreements, *Paper by Chile*, TN/RL/W/152 (Apr. 26, 2004).
 70. Submission on Regional Trade Agreements, *Paper by Chile*, TN/RL/W/151 (Apr. 23, 2004).
 71. Submission on Regional Trade Agreements, *Communication from the Republic of Korea*, TN/RL/W/116 (June 11, 2003).
 72. Discussion Paper on Regional Trading Arrangements, *Communication from India*, TN/RL/W/114 (June 6, 2003).
 73. Submission on Regional Trade Agreements, *Paper by Turkey*, TN/RL/W/32 (Nov. 25, 2002).
 74. Submission on Regional Trade Agreements by the European Communities and their Member States, *Communication from the European Communities*, TN/RL/W/14 (July 9, 2002).
 75. Submission on Regional Trade Agreements by Australia, *Communication from Australia*, TN/RL/W/15 (July 9, 2002).
 76. Submission on Regional Trade Agreements: Key Issues for Consideration, *Communication from Australia*, TN/RL/W/2 (Apr. 24, 2002).

While recognizing that priority should be given to multilateral negotiations, we suggest that if the Doha Round continues to be in a deadlock, members should utilize alternative modes of rule-making, such as authoritative interpretations or amendments.⁷⁷ More specifically, the Ministerial Conference and the General Council could resort to their “exclusive authority to adopt interpretations” under Article IX:2 of the Marrakesh Agreement.⁷⁸ The Appellate Body stated that such “multilateral interpretations are meant to clarify the meaning of existing obligations, not to modify their content.”⁷⁹ Since the clarification of SAT, the term “other restrictive regulations of commerce” and some other controversial concepts used in the existing WTO provisions will hardly alter members’ rights and obligations, the interpretation envisaged by Article IX:2 could indeed be a useful tool. The Article IX:2 procedure can be triggered by a recommendation of the Council overseeing the functioning of the relevant agreement, i.e. the Council for Trade in Goods (for RTAs under the GATT and the Enabling Clause) and the Council for Trade in Services (for RTAs under the GATS), followed by a final decision taken by a three-fourths majority of the members.⁸⁰ Although the Ministerial Conference or the General Council will first seek to reach an agreement by consensus, voting will remain the last-resort option.⁸¹

Amendments under Article X of the Marrakesh Agreement could be resorted to as an alternative to the multilateral interpretation track. A pertinent proposal to the Ministerial Conference may be put forward by either a member or a relevant Council. The Ministerial Conference then decides by consensus, or failing that by a two-thirds majority, whether to submit the proposal to members for acceptance.⁸² The legal effect of the proposed amendment depends on its nature. If the amendment intends to “alter the rights and obligations” of the members, it will take effect, as a principle, for the accepting members only, provided that it has been approved by at least two thirds of the members.⁸³ But the amendment that would not modify the existing rights and obligations will be effective

77. Mary E. Footer observes that principal rule-making in the WTO materializes through formal treaty-making processes and secondary treaty rules such as multilateral interpretations or amendments that revise or modify primary treaty rules. See MARY E. FOOTER, AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION 181–270 (2006).

78. Marrakesh Agreement, *supra* note 11, art. IX:2.

79. Appellate Body Reports, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Second Recourse to Article 21.5 of the DSU by Ecuador / European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Article 21.5 of the DSU by the United States*, ¶ 383, WT/DS27/AB/RW2/ECU (Nov. 26, 2008) (adopted Dec. 11, 2008) / WT/DS27/AB/RW/USA (Nov. 26, 2008) (adopted Dec. 22, 2008).

80. Marrakesh Agreement, *supra* note 11, art. IX:2.

81. Council for Trade-Related Aspects of Intellectual Property Rights, *Note by the Secretariat: Proposals on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Thematic Compilation*, ¶ 8, IP/C/W/363/Add.1 (July 23, 2002).

82. Marrakesh Agreement, *supra* note 11, art. X:1.

83. *Id.*

for all members upon acceptance by a two-thirds majority.⁸⁴ The determination as to which of these two categories is the case is to be made by the Ministerial Conference once it decides to submit the proposal to the members for acceptance.⁸⁵ As for the GATS, the legal effect of an amendment depends not on changeability of rights and obligations but the part of the agreement which is to be amended.⁸⁶ For instance, the amendment of GATS Article V, which is contained in Part II of the agreement, would apply, as a principle, solely to accepting members.⁸⁷

It is noteworthy that the demarcation line between "non-altering" amendments and authoritative interpretations seems to be blurred as in both situations there would be no fundamental change in members' status under current rules.⁸⁸ If members prefer to use "non-altering" amendment procedures with a lower two-thirds threshold rather than the procedures for authoritative interpretation, the probability of approval will be higher. In any event, the attractiveness of multilateral interpretations or amendments consists in the fact that the voting possibility for either procedure undoubtedly provides members with more space for maneuver than if they were to decide by consensus. This legitimately available way of rule-making has already been resorted to in the WTO with respect to intellectual property and public health,⁸⁹ and could be used for RTA issues as well.

Finally, a few words are worth noting with regard to the rule-making on WTO procedures for RTAs. Notably, as part of the Doha negotiations, the General Council adopted the Decision of 14 December 2006 entitled "Transparency Mechanism for Regional Trade Agreements" (2006 Decision).⁹⁰ The text of this decision introducing, on a provisional basis, a special transparency mechanism (TM) for regional arrangements may give the impression that the new transparency process *co-exists* with the corresponding procedures set forth under the original WTO provisions related to RTAs.⁹¹ At the same time, the decision calls for a reappraisal of the TM whereby members will "review the legal relationship between

84. *Id.* art. X:3.

85. *Id.* art. X:4.

86. *Id.* art. X:1.

87. *Id.* art. X:5.

88. The delineation between authoritative interpretations and amendments may not always be an easy exercise. See, e.g., FOOTER, *supra* note 77, at 265.

89. See General Council, *Amendment of the TRIPS Agreement, Decision of 6 December, 2005*, WT/L/641 (Dec. 8, 2005).

90. General Council, *Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006*, WT/L/671 (Dec. 18, 2006) [hereinafter 2006 Decision].

91. See, e.g., *id.* at preamble ("[h]aving regard also to the transparency provisions [of the WTO provisions on RTAs] . . ."); *id.* ¶ 1 (on "Early Announcements" stating "[w]ithout prejudging the substance and the timing of the notification required under Article XXIV of the GATT 1994, Article V of the GATS or the Enabling Clause, nor affecting Members' rights and obligations under the WTO agreements in any way . . ."); *id.* ¶ 5 (on "Procedures to Enhance Transparency" stating "without affecting Members' rights and obligations under the WTO agreements under which it has been notified, the RTA shall be considered by Members . . .").

this Mechanism and relevant WTO provisions related to RTAs.”⁹² Since the simultaneous use of both the old (examination) procedures on RTAs and the transparency process under the 2006 Decision is virtually impossible for practical reasons, we can at least speak of a *de facto* replacement of the previous procedures by the new ones.⁹³ But, for the purpose of greater clarity, this replacement should explicitly be reflected in a legal text in the future before the TM will be operating on a permanent basis.

IV. RTAS AND WTO MULTILATERAL SURVEILLANCE

The “control” functions of the WTO concerning RTAs are not confined to rule-making. In this section, we will examine the mechanism of multilateral reviews of RTAs which falls within the purview of WTO’s bodies. This track is a product of rule-making initiatives and has certain implications for judicial reviews of regional arrangements.

A. FROM LEGAL SCRUTINY TO TRANSPARENCY PROCESS

The multilateral oversight of individual RTAs in the previous GATT 1947 system was conducted by separate working parties, with the CONTRACTING PARTIES having played an overall coordinating role. In the WTO period, the task of working parties was transferred by the 1996 Decision of the General Council to the newly-created Committee on Regional Trade Agreements (CRTA) with the following terms of reference:

[T]o carry out the examination of agreements in accordance with the procedures and terms of reference adopted by the Council for Trade in Goods, the Council for Trade in Services or the Committee on Trade and Development, as the case may be, and thereafter present its report to the relevant body for appropriate action.⁹⁴

The purpose of such examinations was to give a legal assessment of whether an RTA under review was compatible with multilateral trade rules. But the obscure language of the provisions on RTAs and the consensus-based decision-making procedures were the main hurdles in reaching any definitive findings. Only the CU between the Czech Republic and the Slovak Republic was an exceptional case where the GATT working party was able to reach a clear-cut conclusion about its full compatibility with the GATT.⁹⁵ The unequivocally positive determination here was possible, in our opinion, mainly because the CU in question inherited all necessary elements—the common commercial policy and the absence of internal barriers to trade—that had already existed in the single country (Czechoslovakia) to which the RTA parties used to belong

92. *Id.* ¶ 23.

93. See Petros C. Mavroidis, *WTO and PTAs: A Preference for Multilateralism? (or, the Dog that Tried to Stop the Bus)*, 44 J. WORLD TRADE 1145, 1149 (2010).

94. Committee on Regional Trade Agreements, *Decision of 6 February 1996*, ¶ 1(a), WT/L/127 (Feb. 7, 1996).

95. See GATT, Working Party on the Customs Union between the Czech Republic and the Slovak Republic—Report, ¶ 9, L/7501 (July 15, 1994).

just before this union was formed.⁹⁶

With the adoption of the 2006 Decision, multilateral reviews are now conducted under the TM which possesses a number of novel features, such as uniform procedures for all RTAs, early announcements, specific time-limits, a greater Secretariat's role, and the counter-notification and consideration of agreements.⁹⁷ The TM consists of: (1) early announcements, (2) notification, (3) transparency process, and (4) subsequent notification and reporting of changes. To give more detail, early announcements are required for RTAs under negotiation, or newly signed but not yet in force.⁹⁸ Once the agreement is concluded, member parties must notify it with specification of the WTO provision under which it is notified.⁹⁹ The transparency process represents, in essence, the process of considering notified RTAs by WTO membership within either the CRTA (for RTAs falling under the GATT and GATS) or the CTD (for RTAs falling under the Enabling Clause). The emphasis on "consideration" (instead of "examination") implies that the TM does not address the issue of the legal compatibility of RTAs with WTO rules, as it used to be before.¹⁰⁰ For the purposes of the transparency process, member parties must provide the Secretariat with the necessary data, and the Secretariat must prepare a factual presentation for each notified agreement, or factual abstracts for RTAs which were examined prior to the TM launch.¹⁰¹ Finally, the parties are required to notify any changes affecting the implementation or operation of RTAs, and submit, at the end of the RTA's implementation period, a short report on the fulfillment of liberalization commitments in the RTA.¹⁰² Table 2 shows the state of play in the multilateral review of RTAs to date.

96. See *id.* ¶¶ 5–6.

97. See Sherzod Shadikhodjaev, *Checking RTA Compatibility with Global Trade Rules: WTO Litigation Practice and Implications from the Transparency Mechanism for RTAs*, 45 J. WORLD TRADE 529, 537–40 (2011).

98. See 2006 Decision, *supra* note 90, ¶¶ 1–2.

99. See *id.* ¶¶ 3–4.

100. See Shadikhodjaev, *supra* note 97, at 538–39.

101. See 2006 Decision, *supra* note 90, ¶¶ 7, 18, 20–22.

102. See *id.* ¶¶ 14–15.

Table 2. RTAs under the WTO Multilateral Process (as of 1 March 2013)¹⁰³

Status	Enabling Clause	GATS Article V	GATT Article XXIV	Grand total
Factual Presentation not distributed	12	32	80	124
Factual Presentation on hold	0	4	0	4
Factual Presentation distributed	4	54	76	134
Factual Abstract not distributed	0	0	0	0
Factual Abstract distributed	11	21	43	75
Report adopted	1	0	17	18
No report	8	0	0	8
Grand total	36	111	216	363

B. IMPLICATIONS FOR JUDICIAL REVIEWS OF RTAs

The current TM has a number of important implications for WTO dispute settlement dealing with RTA-related issues. First, with no further need for a multilateral judgment as to the RTA's legality under WTO law, the TM has drawn a clear borderline in the jurisdiction between the WTO's political bodies (the CRTA and the CDT) and judicial bodies (panels and the Appellate Body).¹⁰⁴ We recall that in the past some commentators were concerned about an impairment of the balance of political and judicial powers in the WTO caused, as they argued, by an Appellate Body's finding in *Turkey-Textiles*. In that case, the Appellate Body held that panelists were entitled to review the overall consistency of an RTA with WTO rules—the competence, which in the commentators' view, should be attributed to the political bodies only.¹⁰⁵ However, we believe that the TM has now dismissed their concern.

Second, the 2006 Decision requirement that RTAs should be notified and the provision(s) under which the RTAs are notified should be specified¹⁰⁶ will also play its role in WTO litigation. As will be considered in section V, for a legal defense for an RTA-related measure found to be WTO-inconsistent, a respondent must prove that the invoked RTA itself

103. See WTO, *supra* note 4 (note: for RTAs notified to the GATT 1947 and covered by paragraph 22 (a) of the 2006 Decision, the status "Report adopted"/"No report" indicates whether or not a GATT 1947 working party conducted an examination of such agreements and issued a report).

104. Shadikhodjaev, *supra* note 97, at 540.

105. See Frieder Roessler, *The Institutional Balance between the Judicial and the Political Organs of the WTO*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 325, 339–345 (Marco Bronckers & Reinhard Quick eds., 2000); Youri Devuyt & Asja Serdarevic, *The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap*, 18 *DUKE J. COMP. & INT'L L.* 1, 65–72 (2007).

106. See 2006 Decision, *supra* note 90, ¶¶ 3–4.

complies with the relevant WTO provisions. The Understanding on Article XXIV stipulates that CUs or FTAs, to be consistent with Article XXIV, must satisfy, *inter alia*, the notification requirement therein,¹⁰⁷ which is further detailed in the 2006 Decision. Thus, for the purpose of the WTO-consistency test under Article XXIV, panelists should check, *inter alia*, whether the agreement at issue is properly notified. Although the Understanding above is applicable to RTAs falling under Article XXIV, we do not see any reason for why the compatibility with the notification requirement should not be similarly checked for RTAs falling under the GATS and the Enabling Clause. To sum up, only RTAs appropriately notified to the WTO should be considered for the purposes of defense under GATT Article XXIV, GATS Article V, or the Enabling Clause, as the case may be.¹⁰⁸

Third, there should be parallelism between notifications and legal defenses when it comes to the application of the relevant WTO provisions. For instance, if an RTA is notified under Article XXIV, a member party should be allowed to rely only on this provision, and not the Enabling Clause. Otherwise, "rule shopping" may take place when that party expects more successful defense under the Enabling Clause for a tariff *reduction* provided to its RTA partner alone.¹⁰⁹ The awareness of such a parallelism "principle" may sometimes bring about controversies between RTA parties and non-parties over the provision under which notification is to be done. The choice between Article XXIV and the Enabling Clause was questioned in the case of e.g., Southern Common Market (MERCOSUR), the FTA between China and the Association of Southeast Asian Nations (ASEAN), and the Gulf Cooperation Council CU.¹¹⁰ Moreover, the parallelism "principle" seems to, at least partly, cause the problem of dual notifications—the situation where the same agreement is notified by different parties under both Article XXIV and the Enabling Clause. For example, the India-Korea Comprehensive Economic Partnership Agreement (CEPA) and the Korea-ASEAN FTA were notified under Article XXIV (by Korea) and the Enabling Clause (by India and ASEAN members respectively).¹¹¹ Such a dissimilar choice may proba-

107. Understanding on Article XXIV, *supra* note 39, ¶ 1.

108. See Shadikhodjaev, *supra* note 97, at 540–541.

109. *Id.* at 541–543.

110. See GATT, *Latin American Integration Association, Information on Measures Taken by Member Countries of the Association in 1991 under the 1980 Treaty of Montevideo*, L/6985 (Mar. 5, 1992); GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 14 July 1992*, at 34–46, C/M/258 (Aug. 4, 1992); Committee on Trade and Development, *Framework Agreement on Comprehensive Economic Cooperation between the Association of South East Asian Nations and the Parties to the Agreement—Addendum*, at 1–2, WT/COMTD/51/Add.2 (Feb. 8, 2006); Committee on Regional Trade Agreements, *Gulf Cooperation Council Customs Union—Notification from Saudi Arabia—Corrigendum*, WT/REG222/N/1/Corr.1 (Mar. 31, 2008); Committee on Regional Trade Agreements, *Fifty-first Session—Note on the Meeting of 27–28 November 2008*, at ¶¶ 25–35, WT/REG/M/51 (Dec. 19, 2008).

111. For the India-Korea CEPA, see Committee on Regional Trade Agreements Council for Trade in Services, *Notification of Regional Trade Agreement—Republic of*

bly originate from the different anticipation of the parties as to what provision could secure a more favorable finding in a possible dispute with their participation in the future. However, should both parties to the agreement be involved in the same dispute,¹¹² panelists would likely have difficulty in choosing an applicable rule. To preclude this, we will argue in the next subsection that the TM should be revised accordingly.

Fourth, the WTO Secretariat's factual presentations—which do not have “any value judgment” and are used as reference materials during the consideration of RTAs—“shall not be used as a basis for dispute settlement procedures or to create new rights and obligations for Members.”¹¹³ This clause serves to alleviate members' concern that the information they submitted as part of their notification obligation¹¹⁴ could be used against them in future WTO litigations.¹¹⁵ Thus, complainants are banned from invoking factual presentations against RTA parties in dispute settlements, while respondents may still rely on factual presentations for the purpose of a legal defense. This ensures that information in factual presentations will be used not against but in the interest of the notifying member.¹¹⁶

Korea and India, WT/REG286/N/1, S/C/N/558, (July 1, 2010); Committee on Trade and Development Council for Trade in Services, *Notification of Regional Trade Agreement—India and the Republic of Korea*, WT/COMTD/N/36, S/C/N/570 (Sept. 29, 2010). For the Korea-ASEAN FTA, see Committee on Regional Trade Agreements Council for Trade in Services, *Notification of Regional Trade Agreement—The Republic of Korea and the Member Countries of the Association of Southeast Asian Nations (ASEAN)*, WT/REG287/N/1, S/C/N/559 (July 8, 2010); Committee on Trade and Development Council for Trade in Services, *Notification of Regional Trade Agreement—Brunei Darussalam, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam*, WT/COMTD/N/33, S/C/N/560 (July 8, 2010). For an online database of diverse resources regarding Korea's socio-economic development including FTA policy, see *K-Developedia*, KDI SCHOOL OF PUBLIC POLICY AND MANAGEMENT, <https://www.kdevelopedia.org> (last visited Sept. 23, 2013).

112. A single complaint can be brought against both parties to the same RTA when both of them have adopted an identical measure to implement the RTA. The practice of lodging a single complaint against several WTO members took place in several dispute settlements. See, e.g., Request for Consultations by Argentina, *European Union and a Member State—Certain Measures Concerning the Importation of Biodiesels*, WT/DS443/1 (Aug. 17, 2012); Request for Consultations by Brazil, *European Union and a Member State—Seizure of Generic Drugs in Transit*, WT/DS409/1 (May 12, 2010); Request for Consultations by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/1 (Oct. 6, 2004).
113. 2006 Decision, *supra* note 90, ¶¶ 9–12.
114. Pursuant to paragraph 9 of the 2006 Decision, the Secretariat's factual presentation “shall be primarily based on the information provided by the parties.” *Id.* ¶ 9.
115. See Negotiating Group on Rules, *Background Note by the Secretariat: Compendium of Issues Related to Regional Trade Agreements*, ¶¶ 17–20, TN/RL/W/8/Rev.1 (Aug. 1, 2002).
116. See Shadikhodjaev, *supra* note 97, at 543–47.

C. PROSPECTS

1. *TM Reforms*

The TM has in general been highly praised for its important role in ensuring transparency in and understanding of RTAs.¹¹⁷ The 2006 Decision requires members to "review, and if necessary modify" the current TM, and make it a permanent mechanism.¹¹⁸ In this regard, the Chairman of the Negotiating Group on Rules recently issued a revised TM draft where some of the proposed modifications are put in square brackets due to the lack of agreement among members.¹¹⁹

Two of the bracketed changes are especially noteworthy and should, in our opinion, be fully endorsed. The 2006 Decision leaves the possibility for separate notifications of the same agreement by different parties. Thus, the first proposal is to require *all* member parties to an RTA to *jointly* submit an early announcement, notification, and subsequent report.¹²⁰ Should the proposed language be approved, it will effectively solve the dual-notification problem mentioned above, as the parties will have to choose together only one provision for their notification. The second proposal is to place the transparency process for all RTAs under a single body—the CRTA.¹²¹ Because the CRTA and the CTD are both open to the entire membership, and RTA parties are subject to the same data requirements,¹²² we do not see any compelling reason against this idea of integrating the transparency procedures.¹²³ The biggest advantage of this proposal is the increased efficiency of the TM work, because RTA reviews under a single body would avoid unnecessary duplications in the system resulting from separate considerations of the same agreement in the CRTA and the CTD triggered by dual notifications. Moreover, this proposal obviates the need for the ongoing debate in the WTO on the appropriate forum for consideration of systemic implications of RTAs for the multilateral trading system and enables members to get an overall picture of the systemic implications of all regional arrangements. The next part of our analysis evaluates the WTO work on such systemic implications.

117. Negotiating Group on Rules, *Communication from the Chair of the Negotiating Group on Rules*, Ambassador Valles Galmés, TN/RL/25 (May 6, 2010).

118. 2006 Decision, *supra* note 90, ¶ 23.

119. Negotiating Group on Rules, *Negotiations on Regional Trade Agreements: Transparency Mechanism for Regional Trade Agreements*, TN/RL/W/252 (Apr. 21, 2011).

120. *Id.* ¶ 3.

121. *Id.* ¶ 18.

122. See 2006 Decision, *supra* note 90, Annex.

123. For a persuasive argument in support of the single TM process, see Negotiating Group on Rules, *Review of the RTAs Transparency Mechanism Under Paragraph 23: Proposal for the Consideration of All RTAs in a Single WTO Committee*, ¶ 6, TN/RL/W/248 (Jan. 24, 2011).

2. *Systemic Implications of RTAs*

In 1997, the CRTA agreed to deal with “systemic issues”—questions of cross-cutting concern—under a three-pronged approach, including: (1) legal analysis of relevant WTO provisions, (2) horizontal comparisons of RTAs, and (3) a debate on the context and economic aspects of RTAs.¹²⁴ Given the continued expansion of regionalism and persistent deadlock in the Doha negotiations, the importance of systemic issues has increased dramatically. Not surprisingly, a growing number of WTO members has called for the clarification of the interaction between RTAs and the multilateral trading system so as to ensure mutual complementarity. In this context, a large group of developed and developing country members led by Australia jointly proposed for the Eighth Ministerial Conference (Geneva, December 15–17, 2011) a draft decision with the following content:

Ministers noted the growth and increasing prominence of RTAs in world trade. They noted with satisfaction the extensive information on RTAs made available under the Transparency Mechanism and emphasized that its further success will depend on Members’ continued efforts, including submitting relevant information in a timely manner. Ministers also saw value in WTO Members assessing the systemic implications of RTAs for the multilateral trading system and the relationship between them, within the mandate of the Committee on Regional Trade Agreements (CRTA). Accordingly, Ministers directed the CRTA to undertake a work programme where Members would be assisted by factual reports to be prepared by the Secretariat, to consider the elements, practices and development aspects of RTAs. This work programme could help Members reflect on the systemic implications of RTAs for the multilateral trading system and discuss practices that can help further the objectives of the multilateral trading system. The results of this work programme will be reported to the Ninth Ministerial Conference of the WTO.¹²⁵

The joint proposal, in essence, calls upon the CRTA to examine cross-cutting issues with a view of determining systemic impacts of RTAs for the WTO system. Originally, this initiative came out in response to previous appeals by some WTO officials for the improvement of the multilateral surveillance “through . . . highlighting better the common elements in different RTAs” and the adoption of a more focused working program thereon.¹²⁶ However, the Ministerial Conference failed to adopt the proposed decision, so that its Chairman simply noted in his concluding statement that many members stressed the need to address systemic

124. Negotiating Group on Rules, *Informal Open-Ended Meeting with Senior Officials: 25 November 2009*, TN/RL/W/246 (Nov. 27, 2009).

125. Committee on Regional Trade Agreements, *A Proposal from Australia; Canada; Chile; Colombia; Costa Rica; European Union; Hong Kong, China; Japan; Mexico; New Zealand; Norway; the Republic of Korea; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, ¶ 1, WT/REG/W/63/Rev.1 (Oct. 25, 2011).

126. Committee on Regional Trade Agreements, *Communication from Argentina; Australia; Canada; Chile; China; Hong Kong, China; India; Japan; New Zealand and the Republic of Korea*, ¶ 2, WT/REG/W/54/Rev.2 (Nov. 10, 2010).

implications of RTAs and report to the Ninth Ministerial Conference.¹²⁷

The opponents of the proposal in question—mainly developing country members—have, on several occasions, voiced concerns about possible overlaps with the Negotiating Group on Rules, the relationship between the TM and the anticipated working program, benchmark-setting implications for future RTAs, the coverage of RTAs to be reviewed, the role of the Secretariat, and other emerging issues.¹²⁸ However, the main sticking point has been a seeming conflict of jurisdiction between the CRTA and the CTD as to the operation of the proposed program.¹²⁹ On the one hand, the CRTA has a clearly-defined mandate “to consider the systemic implications of such agreements and regional initiatives for the multilateral trading system and the relationship between them, and make appropriate recommendations to the General Council.”¹³⁰ The term “agreements” here refers to “all bilateral, regional, and plurilateral trade agreements of a preferential nature.”¹³¹ On the other hand, the CTD’s terms of reference are to “serve as a focal point for consideration and coordination of work on development” in the WTO, and “consider any questions . . . with regard to . . . the application . . . of special provisions in the [WTO agreements and decisions] in favor of developing country Members and report to the General Council for appropriate action.”¹³² In a nutshell, while the CRTA has an explicit competence to consider systemic implications of apparently *all types* of RTAs,¹³³ the CTD’s mandate for developmental issues can also be said to implicitly include systemic implications of those RTAs that have a bearing on development.¹³⁴

It appears to us that the CRTA’s explicit mandate should be interpreted taking into account two facts. First, the CRTA was, in principle, contemplated as a sole body in charge of the examination of all notified

127. World Trade Organization, *Chairman’s Concluding Statement: Eighth Ministerial Conference*, pt. II, WT/MIN(11)/11 (Dec. 17, 2011).

128. See, e.g., Committee on Regional Trade Agreements, *Note on the Meeting of 18-19 September 2012*, ¶¶ 25–29, WT/REG/M/66 (Sept. 26, 2012); Committee on Regional Trade Agreements, *Note on the Meeting of 20 March 2012*, ¶¶ 17–33, WT/REG/M/64 (Apr. 16, 2012); Committee on Regional Trade Agreements, *Note on the Meeting of 9 and 15 November 2011*, ¶¶ 29–58, WT/REG/M/63 (Jan. 17, 2012); Committee on Regional Trade Agreements, *Note on the Meeting of 22 and 23 September 2011*, ¶¶ 20–33, WT/REG/M/62 (Nov. 4, 2011).

129. See, e.g., Committee on Regional Trade Agreements, *Note on the Meeting of 20 March 2012*, ¶¶ 17, 20, 30, 32–33, WT/REG/M/64; Committee on Regional Trade Agreements, *Note on the Meeting of 9 and 15 November 2011*, ¶¶ 23, 29, 37, 44–48, WT/REG/M/63.

130. *Decision of 6 February 1996*, *supra* note 94, ¶ 1(d).

131. *Id.* n. 1.

132. Committee on Trade and Development, *Decision by the General Council on 31 January 1995*, ¶¶ 1, 4, WT/L/46 (Feb. 23 1995).

133. This is what especially developed countries have argued. See, e.g., Council on Regional Trade Agreements, *Note on the Meeting of 18–19 September 2012*, ¶¶ 22–24, 27 WT/REG/M/66 (Sept. 26, 2012).

134. This is what developing countries have argued. See, e.g., Council on Regional Trade Agreements, *Note on the Meeting of 20 March 2012*, ¶¶ 17, 20, 24, 30, 32, WT/REG/M/64 (Apr. 16, 2012).

RTAs.¹³⁵ Indeed, the general practice prior to the establishment of the TM was that the RTAs falling under the GATT, the Enabling Clause and the GATS were notified to, respectively, the Council for Trade in Goods, the CTD, and the Council for Trade in Services that then could transfer the agreements to the CRTA for examination.¹³⁶ Second, with the establishment of the TM, the situation has changed: the task of the multilateral surveillance of individual RTAs is now divided between the CRTA and the CTD. Therefore, the CRTA's mandate established in the 1996 Decision cannot be read in isolation from new developments initiated by the 2006 Decision on the TM.

We recall that the 2006 Decision is subject to change given the provisional nature of the TM. To settle the jurisdictional problem, we propose two alternative approaches depending on what final transparency process will be established. If the final decision on the TM continues to endow both the CRTA and the CTD with the responsibility to consider RTAs under their purview, then the systemic-effect analysis should logically be divided between these two bodies accordingly. In this case, the final decision should be recognized as superseding the 1996 Decision in relevant parts. Alternatively, but in our view more desirably, if the final decision provides the CRTA with the exclusive authority to consider RTAs, this body should be solely responsible for the review of systemic implications, as well.

Given the disagreement over the proposal tabled by Australia and its partners, members should reenergize their consultations with a view to developing a new approach to the systemic issues.¹³⁷ Alongside the clarification of the CRTA/CTD mandate, they should ensure that this will be a member-driven process which will target respective RTAs taken collectively, without prejudice to the legitimacy of individual agreements, and will not introduce mandatory templates for future RTAs to follow. Needless to say, they should also specify the list of cross-cutting issues from which systemic implications will be drawn out, the nature of reference materials to be prepared by the Secretariat, the coverage of subject agreements in the light of their notification and consideration statuses, and other technical matters.

V. RTAS AND WTO JUDICIAL PROCEDURES

The third area where the WTO can fulfill its "control" functions towards RTAs and enforce the relevant rules is dispute settlement. Unlike

135. This can be inferred from the CRTA's terms of reference. See section IV.A, *supra*.

136. It is true that CRTA's examination of RTAs under the Enabling Clause and the GATS was not a common practice, but the CRTA could, in principle, examine these agreements if it was requested so by the CTD or the Council for Trade in Services respectively. See *Work of the Committee on Regional Trade Agreements (CRTA)*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited July 28, 2013).

137. See, e.g., Council on Regional Trade Agreements, *Note on the Meeting of 18–19 September 2012*, ¶ 26, WT/REG/M/66 (Sept. 26, 2012).

rule-making and the multilateral surveillance, this field is limited only to RTAs involved in disputes that are handled by a small group of adjudicators—panels and the Appellate Body. With the TM focusing on transparency issues, the litigation procedures take on added importance by providing the only avenue where the WTO-compatibility of regional agreements can be scrutinized.

A. JUSTICIABILITY OF RTAs

Under the GATT 1947 system, the question whether RTAs could be examined in dispute settlement procedures was addressed in three panel reports. In *EC—Citrus*, the panel concluded that given that “the examination—or re-examination—of Article XXIV agreements was the responsibility of the CONTRACTING PARTIES,” and in the absence of a decision by the contracting parties on this matter, it would not be appropriate for the panel to determine whether preferential agreements at issue conform to Article XXIV.¹³⁸ In *EEC (Member States)—Bananas I*, the panel considered the relationship between Articles XXIV and XXIII (dispute settlement) and observed that if a measure related to Article XXIV could not be examined in dispute settlement procedures, “any contracting party, merely by invoking Article XXIV, could deprive other contracting parties of their rights under Article XXIII.”¹³⁹ It also referred to panel’s authority to handle balance-of-payment disputes in spite of the existence of multilateral procedures under GATT Article XVIII:B.¹⁴⁰ In the later *EEC—Bananas II* case, the panel held that since the Lomé Convention comprised non-GATT parties contrary to Article XXIV:5 (that states that the GATT does not prevent RTAs “as between the territories of contracting parties”), it was not an agreement of the type covered by Article XXIV.¹⁴¹ For this reason, the panel eventually concluded that Article XXIV could not justify the inconsistency with MFN of tariff preferences for bananas accorded to the ACP countries.¹⁴² All three panel reports were not adopted, and are thus of limited legal importance.

After the establishment of the WTO in 1995, the justiciability of RTAs was greatly clarified in the *Turkey—Textiles* case. At issue were quantitative restrictions on Indian textile products that Turkey said were necessary for the completion of its CU with the EC, and hence justified under

138. GATT Panel Report, *European Community—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, ¶¶ 4.6, 4.15, L/5776 (Feb. 7, 1985) (unadopted).

139. GATT Panel Report, *EEC—Member States’ Import Regimes for Bananas*, ¶ 367, DS32/R (June 3, 1993) (unadopted).

140. *Id.* ¶ 365.

141. GATT Panel Report, *EEC—Import Regime for Bananas*, ¶ 163, DS38/R (Feb. 11 1994) (unadopted).

142. *Id.* ¶¶ 156–64.

Article XXIV.¹⁴³ The panel referred to paragraph twelve of the Understanding on Article XXIV which stipulates that WTO dispute settlement procedures could be initiated in relation to "any matters arising from the application of . . . Article XXIV."¹⁴⁴ It construed the term "any matters" as being confined to "specific measures" taken to implement an RTA (such as Turkey's quota at issue), rather than the RTA (the CU) per se.¹⁴⁵ Therefore, it found that a WTO-compatibility test for the Turkey-EU CU as a whole would fall under the jurisdiction of the CRTA, not the panel.¹⁴⁶ However, the Appellate Body decision¹⁴⁷ dismissed the latter finding by indicating that RTAs are, in fact, justiciable in the WTO. This can be inferred from the first of the following two conditions defined by the Appellate Body as necessary for an Article XXIV defense:

First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. . . [B]oth these conditions must be met to have the benefit of the defence under Article XXIV.

We would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled. It may not always be possible to determine whether the second of the two conditions has been fulfilled without initially determining whether the first condition has been fulfilled.¹⁴⁸

The Appellate Body's confirmation of RTA justiciability has a very important implication for dispute settlement dealing with regional trade issues. It opens the door for judicial reviews of RTAs on both fronts: where a legal defense is sought, and arguably where complaints target RTAs per se. Although the question of WTO-consistency of RTAs is more likely to be raised in defense cases as suggested by the litigation practice to date,¹⁴⁹ RTAs per se as disputable (or actionable) measures may, in principle, be complained of before WTO adjudicators.¹⁵⁰

143. See Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (May 31, 1999) (adopted Nov. 19, 1999) [hereinafter Turkey Panel Report].

144. *Id.* ¶ 9.49.

145. *Id.* ¶¶ 9.49–53.

146. *Id.* ¶ 9.52.

147. See Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (Oct. 22, 1999) (adopted Nov. 19, 1999) [hereinafter Turkey Appellate Body Report].

148. *Id.* ¶¶ 58–59 (emphasis added).

149. For possible reasons of the judicial inaction on RTAs, see, e.g., Petros C. Mavroidis, *If I Don't Do It, Somebody Else Will (Or Won't): Testing the Compliance of Preferential Trade Agreements with the Multilateral Rules*, 40 J. WORLD TRADE 187, 207–213 (2006).

150. See Shadikhodjaev, *supra* note 97, at 532–534.

B. THE WTO-COMPATIBILITY ISSUE IN PRACTICE

In *Turkey—Textiles*, the panel did not consider whether the CU between Turkey and the EC is a valid RTA. Instead, it simply assumed arguendo that the CU complies with the requirements of Article XXIV.¹⁵¹ It explained its omission of the CU examination with the lack of panel's jurisdiction and judicial economy. Because this point was not appealed, the Appellate Body did not conduct the compatibility test on its own.¹⁵²

In *Brazil—Retreaded Tyres*, at issue was Brazil's import ban on re-treaded tires except those originating in MERCOSUR countries.¹⁵³ The panel concluded that this measure violated the GATT requirement under Article XI:1 that disallows quantitative restrictions on imports, and that it was not justified under the Article XX(b) exception on the protection of human health and life.¹⁵⁴ For the purpose of judicial economy, the panel found it unnecessary to examine the EC's separate claims under GATT Articles I:1, XIII:1, and Brazil's corresponding defenses under Article XXIV and XX(d).¹⁵⁵ The EC, however, requested the Appellate Body to complete the legal analysis on the unresolved issues (including the Article XXIV defense) in the event it was to confirm certain panel findings. Since the condition, upon which the EC's appeal was contingent, was not fulfilled as a result of the reversal of the relevant panel findings, the Appellate Body declined to complete the legal analysis, avoiding the Article XXIV issue.¹⁵⁶

In two cases, the adjudicators dealt with the situation where an RTA party applied safeguards on specific products from all countries except its RTA counterparts even though the latter's products were initially included in the respective investigations. In *Argentina—Footwear (EC)*, Argentina justified its MERCOSUR exemption with the argument that safeguards otherwise imposed against MERCOSUR members would run counter to Article XXIV:8 that, in its opinion, requires removal of intra-bloc barriers including safeguards.¹⁵⁷ On the basis of the contents of this provision and the possibility of a gradual formation of the CU (i.e., MERCOSUR), the panel concluded that Argentina and other MERCOSUR countries were, in fact, not prevented from imposing safeguard measures vis-à-vis each other.¹⁵⁸ However, the Appellate Body reversed the panel findings—and consequently avoided the WTO-

151. Turkey Panel Report, *supra* note 143, ¶¶ 9.52–55.

152. Turkey Appellate Body Report, *supra* note 147, ¶ 60.

153. See Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 12, 2007) (adopted Dec. 17, 2007).

154. *Id.* ¶ 5.44.

155. *Id.* ¶¶ 7.454–456.

156. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 255–257, WT/DS332/AB/R (Dec. 3, 2007) (adopted Dec. 17, 2007).

157. Panel Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 8.93, WT/DS121/R (June 25, 1999) (adopted Jan. 12, 2000).

158. *Id.* ¶¶ 8.96–102.

compatibility test for MERCOSUR—on the grounds that the Article XXIV issue was not properly before the panel:

In this case, we note that Argentina did not argue before the Panel that Article XXIV of the GATT 1994 provided it with a defence to a finding of violation of a provision of the GATT 1994. As Argentina did not argue that Article XXIV provided it with a defence against a finding of violation of a provision of the GATT 1994, and as the Panel did not consider whether the safeguard measures at issue were introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV, we believe that the Panel erred in deciding that an examination of Article XXIV:8 of the GATT 1994 was relevant to its analysis of whether the safeguard measures at issue in this case were consistent with the provisions of Articles 2 and 4 of the Agreement on Safeguards.¹⁵⁹

The other case involving safeguard measures is *United States—Line Pipe Safeguards*. The panel here observed that the exclusion by the United States of NAFTA imports from global safeguards could be justified under Article XXIV if NAFTA itself meets WTO standards under paragraphs five and eight of Article XXIV.¹⁶⁰ Instead of scrupulously examining, on their own, whether NAFTA indeed complies with Article XXIV, the panelists simply expressed their satisfaction with the US evidence of prima facie compliance.¹⁶¹ But the Appellate Body found the panel's conclusion "moot" and with "no legal effect," because the Article XXIV defense could have been considered only if the parallelism requirement—that the scope of subject products in the investigation and application of safeguards must be the same—had been met.¹⁶² Because the U.S. measure was found to be inconsistent with the parallelism requirement, there was no need for the adjudicators to examine the Article XXIV issue.¹⁶³

C. PROSPECTS

The Appellate Body in the *Turkey—Textiles* case made it clear that Article XXIV defense will not be complete without examination of the overall compatibility of an RTA with the provisions of Article XXIV. This finding can be transposed, *mutatis mutandis*, to defense cases raised under GATS Article V and the Enabling Clause. So far, the WTO adjudicating bodies have not conducted a comprehensive WTO-compatibility

159. Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 110, WT/DS121/AB/R (Dec. 14, 1999) (adopted Jan. 12, 2000).

160. See Panel Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R (Oct. 29, 2001) (adopted Mar. 8, 2002).

161. *Id.* ¶¶ 7.142–146.

162. Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 199, WT/DS202/AB/R (Feb. 15, 2002) (adopted Mar. 8, 2002).

163. *Id.* ¶¶ 178–199.

test on the pretext of the lack of competence, judicial economy, or the absence of appeals. It appears that unless WTO members as main rule-makers bring more clarity to the existing disciplines, the adjudicators will try not to open Pandora's Box themselves.¹⁶⁴ Therefore, we suggest that if members fail to clarify the rules, they should at least send an encouraging signal to the adjudicators with a view to activating judicial interpretations. This could be done, for instance, through the adoption of a decision which would unequivocally reconfirm the interpretative authority of panels and the Appellate Body on regional trade issues.¹⁶⁵ Such a decision would complement paragraph twelve of the Understanding on Article XXIV that renders RTA-related matters justiciable, and would serve as a certain insurance policy against possible criticism of the judicial way of "making law"—judicial "overreaching"—in the future.¹⁶⁶

On the other hand, the WTO-compatibility test will hardly be avoided where RTAs as such are contested in complaints. In spite of the fact that no member has used this track to date, this option still remains open. For example, if country A's RTA removes duties in intra-trade for a very limited number of products, country B (a non-RTA party) may file a WTO complaint against A (and other parties) over the violation by the RTA of the SAT requirement. Because A's RTA does not satisfy SAT under Article XXIV and thus fails to be an appropriate exception to the MFN principle, country B may claim that duty-free treatment under this RTA should be extended on an MFN basis to the rest of the members. In the case of an RTA with a non-WTO member,¹⁶⁷ a complaining party may similarly ask for the MFN extension of RTA benefits. In both situations, panelists will have no choice but to consider the complainant's claim on its merits.

VI. CONCLUSION

In this article, we revisited the WTO "control" functions in relation to RTAs in three independent but interlinked areas. These functions cannot, of course, keep regionalism from growing. Nevertheless, the instruments available in the three areas are designed to ensure that RTAs remain within the reach of the WTO. On the basis of the observations in this analysis, the state of play in and prospects of the use of these instruments can be evaluated, in brief, as follows.

With respect to rule-making reforms, the biggest success in this field has so far been the establishment of the TM. The 2006 Decision has improved the multilateral review procedures on RTAs and removed, in principle, jurisdictional overlap between the CRTA/CTD and the adjudi-

164. See Mavroidis, *supra* note 149, at 209–10.

165. Shadikhodjaev, *supra* note 97, at 548.

166. *Id.*

167. For problematic aspects of RTAs between a WTO member and non-member, see Won-Mog Choi, *Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States*, 8 J. INT'L ECON. L. 825 (2005).

cating bodies—something that, in our opinion, greatly contributes to the strengthening of the institutional balance within the WTO.¹⁶⁸ On the other hand, the persistent inaction of members to clarify the substantive rules may continue to discourage judicial reviews of RTAs, though it will hardly affect the transparency process as such. Since clearly-defined requirements for regional arrangements have a direct bearing on what should be considered a WTO-consistent RTA, members should intensify their rule-making efforts through negotiations or, failing that, multilateral interpretations and amendment procedures.

The multilateral surveillance mechanism, which used to legally examine RTAs, concentrates now on their transparency only. The TM greatly facilitates WTO members' understanding of individual regional arrangements, and may provide some food for thought on how the existing rules could be improved in light of today's realities. For instance, numerical levels of intra-RTA trade liberalization shown in Secretariat's factual presentations¹⁶⁹ may help members clarify the SAT concept, taking into account the practice to date. Moreover, the operation of the TM may reveal gaps in the transparency process itself, providing grounds for further rule-making initiatives in this field. As considered above, the occasional practice of dual notifications has already provoked members' calls for making joint actions by RTA parties mandatory and consolidation of all the TM procedures under the CRTA. In addition to its potential impact on rule-making, the TM may also be tied to future WTO litigation cases when, for instance, RTA notifications or factual presentations become an issue for judicial considerations. Systemic implications of RTAs for the multilateral trading system are one of the most urgent items for WTO review in the near future—something that requires closer cooperation of members in the adoption of appropriate procedures.

Finally, dispute resolution is also a very important field where the WTO can perform its "control" functions, albeit to a limited extent. Judicial reviews of RTAs are case-specific and dependent on initiations by interested members only. So far, complaints have targeted only specific measures adopted under CUs and FTAs. With the launch of the TM, the dispute settlement procedures remain the only channel through which illegal RTAs could be challenged. Moreover, this track could provide necessary interpretations of many ambiguous terms used in WTO disciplines concerning regional trade. But the irony is that the adjudicators have implicitly shown their unwillingness to embark upon overall WTO-consistency examinations of the RTAs at issue. This kind of judicial passivism is partly due to the fact that members themselves do not hesitate to challenge a particular RTA, and that the rule-making process reached a virtual stalemate. But we anticipate that, with the further proliferation of

168. Shadikhodjaev, *supra* note 97, at 540.

169. For one of the most recent examples, see Committee on Regional Trade Agreements, *Factual Presentation—Free Trade Agreement between China and Costa Rica (Goods and Services)*, § 3.1.2, WT/REG310/1 (Jan. 16, 2013).

RTAs and increasing trade-diversion or other negative effects on non-parties, more disputes will come up in the future requiring a more active role of adjudicators on RTA issues. It is thus not ruled out that legal interpretations that may be produced in the course of dispute settlement will be considered as useful benchmarks in future rule-making developments.

